Sirius XM Radio Inc. v XL Specialty Ins. Co.
2013 NY Slip Op 32872(U)
November 7, 2013
Sup Ct, New York County
Docket Number: 650831/2013
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD PART 49
Justice

SIRIUS XM RADIO INC.,

Plaintiff,

-against-

XL SPECIALTY INSURANCE COMPANY, *et al.*,

Defendants.

INDEX NO. 650831/2013

MOTION DATE Aug. 15, 2013

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to ___ were read on this motion to dismiss action.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [ ] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the accompanying decision and order.

Dated: November 7, 2013

O. PETER SHERWOOD, *J.S.C.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[ ] SUBMIT ORDER/ JUDG. [ ] SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

----------X

SIRIUS XM RADIO INC.,

Plaintiff,

-against-

XL SPECIALTY INSURANCE COMPANY and US SPECIALTY INSURANCE COMPANY,

Defendants.

----------X

DECISION AND ORDER

Index No.: 650831/2013
Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

Defendant XL Specialty Insurance Company (XL) moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing this action. As against XL, the complaint seeks a declaration that XL is obligated to pay plaintiff's litigation costs in five underlying actions, less a $1 million "retention"; it asserts a claim of breach of contract; and it seeks the attorney's fees that plaintiff incurs in this action. In the alternative, the complaint seeks a declaration that defendant US Specialty Insurance Company (USS) must pay plaintiff's loss, also subject to a $1 million retention, and that USS is in breach of its duty.

Plaintiff Sirius XM Radio, Inc. (SXM) was formed by the merger of XM Satellite Radio Holdings Inc. (XM) and a subsidiary of Sirius Satellite Radio, Inc. (Sirius). The complaints in the five underlying actions alleged wrongdoing by the directors and officers of Sirius, XM, and SXM in connection with their efforts to have the merger approved and in respect of their alleged mismanagement of plaintiff after the merger was approved. Those actions are referred to as the *Hartlieb* Action, commenced on July 28, 2008, the *Fialkov* Action, commenced on January 8, 2010, the *Brian Goe* Action, commenced on March 8, 2011, the *Shenk* Action, commenced on April 11, 2011, and the *Jeffrey Goe* Action, commenced on May 20, 2011.

XL issued plaintiff a "Management Liability and Company Reimbursement Policy" (Policy), effective from August 29, 2007 to August 29, 2008, and then extended, with changes that are not relevant here, for one additional year. The Policy is a "claims made" policy, meaning that it covers claims first made during the Policy period. Insofar as is relevant here, the Policy provides as follows:

VI. GENERAL CONDITIONS

(A) NOTICE

(1) As a condition precedent to any right to payment under this Policy with respect to any Claim, the Insured shall give written notice to the Insurer of any Claim as soon as practicable after it is first made.

. . .

(B) INTERRELATED CLAIMS

All Claims arising from the same Interrelated Wrongful Acts shall be deemed to constitute a single Claim and shall be deemed to have been made at the earliest of the time at which the earliest such Claim is made or deemed to have been made pursuant to GENERAL CONDITIONS (A)(1) above or GENERAL CONDITIONS (A)(2), if applicable.

"Claim" is defined to include, "any civil proceeding in a court of law or equity, or arbitration." Policy § II (C) (2). The Policy also provides that "[n]o Insured may incur any Defense Expenses . . . without the Insurer's consent, such consent not to be unreasonably withheld." Policy § V (B).

USS issued a "Directors, Officers and Corporate Liability Policy" to plaintiff, with a one-year policy period commencing on August 29, 2010. The USS policy excludes coverage for any loss

(H) arising out of ... related Wrongful Acts alleged or contained, in any claim which has been reported, or in respect to which any notice has been given, under any policy of which this Policy is a renewal or replacement or which it may succeed in time, or

(I) arising out of ... any pending or prior litigation as of the Inception Date of this Policy, or alleging or derived from the same or essentially the same facts or circumstance as alleged in such pending or prior litigation.

Cirando Affirm., exhibit B, Exclusions (H) and (I).

XL maintains that although it received in the *Hartlieb* Action "notice of circumstances that could lead to [a] Claim under the Policy" (XL Memo of Law, p. 19), it never got timely notice of a Claim. However, for purposes of this motion, it is assumed that plaintiff gave XL timely notice of *Hartlieb* and *Fialkov*, that the *Shenk*, *Brian Goe*, and *Jeffrey Goe* actions are interrelated with *Hartlieb*, within the meaning of XL Policy § VI (B), and that plaintiff also gave USS written notice of *Fialkov*, *Shenk*, *Goe*, and *Goe* a short time after each of those actions was commenced. USS acknowledged receipt of plaintiff's notice of the *Fialkov* Action on January 18, 2010 and determined

that it constituted a "Claim" under the 2009-2010 policy. However, on July 6, 2011, USS's outside counsel notified plaintiff that USS was denying coverage for that action, as well as for the later-filed actions, on the ground that they all relate back to the *Hartlieb* Action, which was filed prior to the beginning of the USS 2009-2010 policy period.

XL argues, principally, that plaintiff failed to give timely notice of any of the underlying claims, other than *Hartlieb* (and *Fialkov*), and that plaintiff failed to get XL's approval before indemnifying its officers and directors for the legal fees that it now seeks to recover. Plaintiff counters that it was not required to give prompt notice of the post-*Hartlieb* actions, because those actions are all interrelated with *Hartlieb* and that XL did not refuse its consent to plaintiff's incurrence of legal fees. The primary document upon which XL relies in its motion pursuant to CPLR 3211 (a)(1) is the Policy, section VI (A)(1) of which requires prompt notice of a claim as a condition precedent for coverage. Sirius argues, however, that section VI (B) qualifies section VI (A)(1) by providing that all claims arising from interrelated wrongs shall be deemed to have been made at the time that the first such claim was made.

XL replies that the "Interrelated Claims provision determines when a Claim is deemed made against an Insured - it has absolutely no bearing on the XL policy's separate notice requirement" (XL Reply Br., p.12). In support of its interpretation of these provisions it cites the holdings in *Harbor Ins. Co. v Continental Bank Corp.* (922 F2d 357 [7th Cir 1990]) and *In Re Ambassador Group, Inc. Litig.* (830 F Supp 147 [ED NY 1993]). Neither of these cases support the claim. In both of those cases, the issue was whether insurance policy provisions requiring (in *Harbor Ins.*), or permitting (in *Ambassador Group*) an insured to give notice of an occurrence that might later give rise to a claim for indemnity, and providing that, were such notice given during the policy period, a claim made after the policy period would be considered to have been made within the policy period, did not relieve the insured of its independent obligation to give notice of the actual claim as soon as practicable. (For the policy provision at issue in *Ambassador Group*, see *National Union Fire Ins. Co. v Ambassador Group, Inc. of Pittsburgh, Pa.*, 691 F Supp 618, 622-623 [ED NY 1988].) Neither *Harbor Ins.*, nor

Ambassador Group, discussed, let alone decided, whether an "interrelated claims" clause, such as Policy § VI (B), modifies the standard requirement to give notice of a claim as soon as practicable. In any event, a reading of § VI (B) suggests otherwise. A Claim includes a "civil proceeding in a court of law or equity or arbitration" (Policy § II [C] [2]). Endorsement number 5, paragraph 1, to the XL Policy states that "[a] Claim shall be deemed first made when the Insurer receives written notice of a Claim or suit from the Insured or a third party." Section VI (A)(1) of the Policy pertains exclusively to the giving of notice of Claim by the Insured. It does not address receipt of written notice of a claim from "a third party" (Endorsement No. 5). Further, Section VI (B) which concerns Interrelated Claims states ambiguously that "[a]ll Claims arising from the same Interrelated Wrongful Acts shall be deemed to constitute a single Claim and shall be deemed to have been made at the earliest of the time at which the earliest such Claim is made or deemed to have been made pursuant to *GENERAL CONDITIONS (A) (1) . . . , if applicable*" (emphasis added). The italicized phrase links § VI (B) to § VI (A) in a paragraph that otherwise appears to have "absolutely no bearing" on the notice requirement of § VI (A) (1).

At this pre-answer stage of the case, it suffices to that XL's parsing of section VI (B), as merely stating that, "*if* timely notice of a Claim is given, that Claim will be treated as having been made in the policy period in which a previous notice of circumstance (or Claim) had been given" (XL, reply, p. 12) is far from compelling. XL ignores the clause upon which Sirius relies, "[a]ll Claims arising from the same Interrelated Wrongful Acts shall be deemed to constitute a single claim." At oral argument, too, counsel for XL ignored that clause, arguing that section VI (B) does not modify the requirement of prompt notice in section VI (A) (1), because § VI (A) (1) refers to "any Claim" in the singular, while section VI (B) initially refers to "[a]ll Claims," in the plural.

Whether the deemed date of the later Claim relieves the Insured of the obligation to give notice each time a later Claim is made is not sufficiently clear from the words of Policy §§ VI (A) (1) and VI (B) to require dismissal of the complaint on the basis of documentary evidence under CPLR 3211 (a)(1) (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 148 [1st Dept 2013]).

That branch of XL's motion that seeks dismissal of plaintiff's breach of contract claim pursuant to CPLR 3211 (a) (7), must be denied. The December 8, 2008 letter from plaintiff's then-broker, giving XL notice of the *Hartlieb* action requested "that XL provide consent for the Insured to incur fees and costs in defense of this matter" Cirando aff., exhibit 2. There is no evidence as to whether XL gave its consent, refused it, or simply ignored that part of the notice. XL's August 9, 2012 letter to plaintiff's broker mentions neither any lack of requests for consent, nor any refusal of consent, but, rather, "requests copies of all fee statements for the *Hartlieb*, *Shenk* and *Fialkov* lawsuits so that XL can further analyze the 'interrelatedness' issue and make a reasonable allocation of defense expenses incurred in defense of . . . litigations which are related to *Hartlieb* [and those not related] and therefore falling outside the scope of coverage of the 2007 to 2008 Primary Policy." Sandness affirmation, exhibit E, 6 to exhibit A. In opposing a motion to dismiss, made pursuant to CPLR 3211 (a) (7), a plaintiff may use evidence extrinsic to the complaint "to preserve inartfully pleaded but potentially meritorious claims." *R.H. Sanbar Projects*, 148 AD2d 316, 318 (1st Dept 1989); *see also Uzzle v Nunzie Ct. Homeowners Assoc., Inc.*, 70 AD3d 928 (2d Dept 2010). Plaintiff has a cause of action.

That branch of XL's motion that seeks dismissal of plaintiff's request for attorney's fees will be granted because such fees are available from an insurer only where, unlike here, the insurer has cast the insured in a defensive posture. *See Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21-22 (1979); *Mahler v New England Mut. Life Ins. Co.*, 267 AD2d 146 (1st Dept 1999); *compare U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597-598 (2004).

Accordingly, it is hereby

ORDERED that defendant, XL Specialty Insurance Company's, motion to dismiss is GRANTED to the extent that the request of plaintiff, Sirius XM Radio, Inc., for the attorney's fees it will incur in this action is dismissed and the motion is, otherwise, DENIED.

This constitutes the decision and order of the court.

DATED: November 7, 2013

ENTER,

O. PETER SHERWOOD
J.S.C.